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February 4, 2003

Ex Parte Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte Presentation*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On February 3, 2003, Michael Glover and Ed Shakin of Verizon, Jonathan Banks of BellSouth, and the undersigned met with John Rogovin, Linda Kinney, and Debra Weiner of the Office of General Counsel. The issues discussed at this meeting are reflected in the attached documents.

One original and two copies of this letter are being submitted to you in compliance with 47 C.F.R. § 1.1206(a)(2) to be included in the record of these proceedings. If you have any questions concerning this matter, please contact me at (202) 326-7902.

Sincerely,

Michael K. Kellogg

Attachments

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Legal Department
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January 31, 2003

EX PARTE

Ms Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: *Ex Parte Presentation* CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 31, 2003, Margaret Greene sent the attached letter to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Michael Copps, Commissioner Jonathan Adelstein, and Commissioner Kevin Martin. This letter provides a short white paper that explains the law and the facts that require the Commission to draw a real line between telephone exchange (local) and access services and discusses special safe harbors.

I am filing this notice in the dockets identified above, as required by Section 1.1206(b)(2) of the Commission's rules, and request that you associate this notice with the record of those proceedings.

Sincerely,

Jonathan Banks

Attachment

Cc: Christopher Libertelli
Matt Brill
Jordan Goldstein
Lisa Zaina
Rich Lerner
Bill Maher
Jeffrey Carlisle
Scott Bergman
Michelle Carey
Tom Navin
Jeremy Miller

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Margaret H. Greene
President Regulatory and
External Affairs

January 31, 2003

Chairman Michael Powell
Commissioner Kevin Martin
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Jonathan Adelstein
445 12th Street, SW Portals II Building
Washington, DC 20554

RE: *Ex Parte Presentation,* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, 98-147

Dear Chairman Powell:

This letter provides a short white paper that explains the law and the facts that require the Commission to draw a real line between telephone exchange (local) and access services. It also proposes a set of safe harbor criteria that the Commission could use to determine if UNEs and UNE combinations such as EELs are being used to provide local service. These proposed safe harbors could replace the current safe harbors contained in the *Supplemental Order Clarification.* BellSouth's proposed safe harbors are "architectural" and do not contain specific local traffic requirements. BellSouth believes that a local traffic requirement is the most direct, accurate and simplest way to determine that UNEs are in fact being used for local service, but proposes this architectural solution because a number of CLECs have proposed similar approaches and the Commission may be exploring such an approach.

Substituting a completely new and untried approach for the current safe harbors that were developed by a group of CLECs and ILECs and put formally in place in 2000 is likely to have profound anti-consumer effects.[1] Special access services are subject to real facilities-based competition throughout the country today. That facilities-based competition has grown up without UNE regulation. This competitive environment provides real benefits for the larger businesses that pay for these services, and creates a climate that favors investment in facilities, creates jobs and leads to innovation.

[1] Letter from Suzanne Guyer, Bell Atlantic, to Magalie Roman Salas, Federal Communications Commission, Docket No. 96-98 (filed Feb. 29, 2000) transmitting letter signed by BellAtlantic, Intermedia Communications, BellSouth, SBC, Focal Communications, Time Warner Telecom, GTE, U.S. West and WinStar Communications.

New rules that may have the effect of forcing TELRIC pricing on this business will devalue the huge investments in facilities that carriers have made and create a huge disincentive to new investment with the consequent loss in competition, jobs and innovation. The loss of over 500,00 jobs and 2 trillion dollars of market capitalization in this industry over the past three years highlights the dangers of adopting the wrong regulatory policies. In particular, as carriers consider facilities investments to expand the reach of broadband offerings for businesses, and to create wholly new broadband services, they must know that TELRIC pricing will not become the pricing standard for business broadband.[2]

As background, competitive access providers entered the special access business in 1984, when Teleport began constructing a fiber-optic network in Manhattan. In 1986, the Commission formally preempted "any *de facto* or *de jure* barrier to entry" into the provision of exchange access services.[3] In 1992, the Commission recognized the already extensive build out of alternative local fiber networks, finding that DS1 and DS3 special access services were subject to competition.[4] Later that year, the Commission found that access "competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection."[5] The Commission recognized at the time that basic economics separated access services from the provision of local exchange service because "[t]raffic density is greater, and costs lower, in most central city areas where large concentrations of high volume customers are located."[6] Certainly these basic, long-recognized facts of providing access service to the larger business customers that buy them would prohibit any finding that the access and local services markets are "inextricable intertwined."[7]

The facts show that the Commission's deregulatory path to competition in special access services has generally worked. CLECs now have over 1,800 local fiber networks for the delivery of special access type services. There are over 40 of these networks in Atlanta alone. In 45 of the top 50 MSAs, there are at least two, and most often three, companies that provide DS-1 service that is typically used to provide special access services on a wholesale basis. CLECs provide more voice-grade equivalent lines over these facilities

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[2] Certain CLECs are petitioning the Commission for a requirement that incumbent carriers provide broadband UNEs for the delivery of integrated voice, data and Internet access services to medium and larger businesses. *See* Letter from John Heitmann, on behalf of NuVox, to Marlene H. Dortch, Federal Communications Commission, Docket No. 01-338 (filed Dec. 19, 2002) at 6 (typical broadband customer has 12 to 16 access lines). The Commission fixed the line between small and medium businesses at 4 access lines in the *UNE Remand Order*.

[3] *Cox Cable Communications, Inc.*, Memorandum Opinion, 102 FCC 2d 110 (1985), *vacated as moot*, 61 Rad. Reg. 967 (1986).

[4] *See, In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369, 7451-55 and n. 412(1992) (*Special Access Order*); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (*Transport Phase I*), *Second Report and Order and Third Notice of Proposed Rulemaking*, 8 FCC Rcd 7374, 7423-25 (1993) (*Switched Transport Order*).

[5] *Special Access Order* at ¶¶ 7451, 7452.

[6] *Special Access Order* at ¶ 175.

[7] *Supplemental Order Clarification*

than the Bell companies serve over their own facilities.[8] CLECs report over $10 billion in special access revenues accounting for more than 33% of special access revenues. Investment in special access facilities – fiber rings and connections to buildings – has consistently increased both before and after the 1996 Act because UNEs and TELRIC pricing have not been injected into the provision of special access services.[9]

By requiring real evidence of use for local services, the Commission's current safe harbors provide some guarantee that UNEs are actually used to provide local service and not to substitute for competitive special access type services. Those safe harbors have been in place since 2000, and the market evidence of strong growth in competitive revenues and facilities shows that the current approach is working.

As discussed in the attached white paper, the D.C. Circuit upheld the current use restrictions. The Court specifically agreed with the Commission's reasoning that the safe harbors were necessary to the Commission's efforts to avoid disrupting its access reform policies[10] and to its efforts to protect and encourage facilities-based competitors.[11] The court also specifically upheld the Commission's concern that its commingling restrictions were necessary to prevent carriers from gaming the system by using UNEs to bypass special access services.[12] Specifically, with respect to the claim that current safe harbor provisions are "too demanding" on carriers, the Court found that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors."[13]

BellSouth takes strong exception to suggestions that the current approach is not being properly implemented. For example, the FCC and the Georgia and Louisiana state commissions found that BellSouth was in compliance with its obligations to offer UNE combinations including EELS.[14] BellSouth offers efficient processes for ordering new UNE combinations such as EELS and for converting existing special access services to UNEs.[15] BellSouth began the process of auditing special access circuits that have been converted to UNEs in 2002, two years after the safe harbors were put in place and CLECs began converting circuits. BellSouth has complied with its obligation to convert circuits based simply on an unverified CLEC statement that circuits qualify under a safe harbor, and is well within the Commission's rules to audit compliance after the conversion.

The architectural replacement for the current safe harbors that is attached to this letter has been carefully crafted to impose the minimum requirements consistent with maintaining a

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[8] Attached White Paper at p. 4-5.
[9] See discussion of CLEC facilities and revenues in attached White Paper at 4-5.
[10] *Id.* at 14-16,
[11] *Id.* at 16 (observing that the Supreme Court's discussion of the incentive effects of *TELRIC in Verizon Communs. Inc. v. FCC* would be "meaningless" if "the Court had not understood the Act to manifest a preference for facilities-based competition).
[12] *Id.* at 17-18 (identifying "complex reasons why gaming might occur" in the absence of the Commission's commingling restrictions).
[13] *Id.* at 17.
[14] Georgia/Louisiana 271 Order at ¶¶ 199-200. Georgia Commission GALA I Comments at 134-36l; Louisiana Commission GALA I Comments at 51-54.
[15] Georgia/Louisiana 271 Order at ¶ 200.

line between local and special access services. The essential point of the proposal is to ensure that UNEs are actually being used to provide local service, not just that the CLEC that has ordered them is capable of providing local service. The necessary line between local and special access services can only be maintained by a showing that the UNE circuit is actually used to provide significant local service. Under CLEC proposals, carriers qualify if they possess a few indicia that they do, or merely have some capability to, provide local service to some customer in the general area. For example, by providing local service to a few customers, a carrier would qualify to convert thousands of purely special access circuits to UNEs. These proposals draw no real line between local and special access services and would result in wholesale arbitrage that would undermine the current competitive structure of special access services.

BellSouth's proposal builds on CLEC proposals. It applies to UNE circuits and requires real indicia that local service will be provided. Thus, BellSouth's proposal requires that UNE circuits have local number assignments,[16] 911 capabilities[17] and be able to originate and terminate local traffic.[18] In addition, on high capacity facilities that provide the equivalent of many individual circuits, at least half the circuits (or channels) would have to meet these local requirements.[19] Should UNEs be required to be available for broadband services, which would require a separate impairment finding, UNEs that are being used as part of a packet-switched, variable bandwidth service, must be connected to a switch that performs the functions of a local switch[20] and there must be a sufficient number of telephone numbers associated with the circuit to demonstrate that the circuit is being used to provide a significant amount of local service to the end user.

The legal and policy ramifications of injecting UNE regulation into special access services are broad, deep and counter to the Commission's competition goals. Special access services are provisioned and sold in a radically different environment from that of local exchange services. Exporting the Commission's broad UNE policies designed to create competition for local exchange services to special access would undo years of successful Commission efforts to create a regulatory environment favoring access competition. It would also undo nearly twenty years worth of competitive provider investment in bringing about the very facilities-based competition that the Commission sought to favor.

The Commission should not alter the current safe harbors, which have been upheld by the D.C. Circuit, and that have fostered the continuation of real facilities-based competition for special access customers. The legal and market risks of adopting a new approach that

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[16] *See* Letter from Chris McKee, XO Communications, to Magalie Roman Salas, Docket No. 01-338 (filed January 27, 2003) (XO Ex Parte) at p.8, Letter from Patrick Donovan, on behalf of El Paso Networks, to Marlene H. Dortch, Federal Communications Commission, Docket No. 01-338 (filed January 24, 2003)(El Paso Ex Parte) at 3; Letter from Julia Strow, Cbeyond Communications, to Marlene H. Dortch, Federal Communications Commission, Docket No. 01-338 (filed Jauary 6, 2003)(Cbeyond ex Parte) at 2.

[17] Cbeyond Ex Parte at 2.

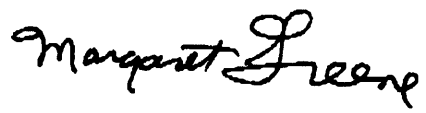
[18] Cbeyond Ex Parte at 2.

[19] XO Ex Parte at 8.

[20] Cbeyond Ex Parte at 2.

The Commission should not alter the current safe harbors, which have been upheld by the D.C. Circuit, and that have fostered the continuation of real facilities-based competition for special access customers. The legal and market risks of adopting a new approach that would discourage investment, innovation and competition should preclude experimentation. However, if the Commission chooses to adopt a new approach, any test must establish a clear and enforceable requirement that UNE circuits are actually providing substantially local services. Without that requirement, UNE arbitrage based on TELRIC pricing will replace facilities-based competition with the predictable ill effects on consumer welfare, jobs and innovation.

Sincerely,



Margaret H. Greene

THE COMMISSION MAY NOT PERMIT HIGH-CAPACITY UNES TO BE USED FOR SPECIAL ACCESS WITHOUT AN IMPAIRMENT FINDING AS TO THAT DISTINCT SERVICE

This paper expresses BellSouth's urgent concern that the Commission is considering taking action in this proceeding that would be contrary to the Commission's own prior, pro-competitive decisions and, moreover, would be flatly unlawful under the recent Supreme Court and D.C. Circuit decisions interpreting the impairment requirement of section 251(d)(2). Specifically, it is BellSouth's understanding that the Commission is considering a requirement that, in sharp contrast to its current rule -- which ensures that high-capacity facilities are used primarily for local service, not special access -- would require ILECs to allow access to high-capacity facilities without limitation and for *all* purposes, including special access, subject only to certain lax criteria. Importantly, moreover, the Commission would mandate the use of UNEs for special access *without* determining separately whether CLECs would suffer impairment without access to these facilities in the distinct market for special access voice and data transport. Such a result would be an about-face from the Commission's prior, highly successful supervision of the special access market and would flout binding precedent. It would also undermine Congress's core goals in implementing the 1996 Act, including the promotion of facilities-based competition and the preservation of universal service.

In the past, the Commission has properly distinguished between special access and local exchange service, and it has sharply limited the use of UNEs to provide special access. The result has been vibrant competition in special access, where competitors now have approximately one-third of the market. BellSouth urges the Commission not to reverse course now. Such a change in direction would permit massive arbitrage, undermine investment, and do great harm to the industry without countervailing benefit.

1. The 1996 Act, as Interpreted by This Commission, the Supreme Court, and the D.C. Circuit, Requires the Commission To Make a Separate Impairment Finding for Separate Services

Congress has permitted the Commission to require unbundled access to network elements only upon a finding of impairment in the provision of a specific services: requesting carriers must be impaired in the "services that [they] seek[] to offer." 47 U.S.C. § 251(d)(2)(B). Binding judicial decisions make plain that, as that language indicates, the Commission must make service-specific findings of impairment before a UNE can be used in providing a specific service. For that reason, the Commission can be justified in relaxing its current restrictions and requiring high-capacity facilities be provided as UNEs for use in providing special access voice and data services *only* if it could first find that CLECs would be impaired *in providing those services* without access to those facilities.

That conclusion follows directly from the decisions of the Supreme Court and the D.C. Circuit. As an initial matter, in *Iowa Utilities Board*, the Supreme Court squarely determined that any appropriate impairment test must consider the availability of facilities "outside the incumbent's network." *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 389 (1999). Amplifying on

that point, the D.C. Circuit subsequently made plain that it is incoherent to consider whether such alternative facilities are "available" without defining a relevant product and geographic market. Indeed, it was precisely the failure to undertake such market-specific inquiries that rendered the *UNE Remand Order* unlawful. The court of appeals explained that, by "loftily abstract[ing] away all specific markets," the *UNE Remand Order* had improperly ensured that "UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of the sort that might have [been] the object of Congress's concern." *USTA v. FCC*, 290 F.3d 415, 422, 423 (D.C. Cir. 2002). In other words, the Commission was required to make market-specific judgments to ensure that unbundling was ordered only where appropriate, and not in markets where CLECs could compete without such forced access. The court of appeals thus explained that the Supreme Court's decision in *Iowa Utilities Board* indicated that the Commission could not support a decision to unbundle through impairment findings that were "detached from any specific markets or market categories," as was the case with the *UNE Remand Order*. *Id.* at 426; *see also CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002).

These decisions establish that it is contrary to the 1996 Act for the Commission to require that ILECs permit the use of UNEs in specific product markets, such as special access, without determining whether CLECs are impaired in those markets. The Commission simply may not conclude that because a CLEC needs a facility for one purpose, it can use that facility for any purpose. Rather, at the very least, the Commission must place significant restrictions on the use of the facility to ensure that it is being used primarily, if not exclusively, in the market where impairment has been found.

Indeed, that is precisely the lesson of the Commission's own *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000), which was issued even before *USTA* and which of course deals with the same issue presented here. Acknowledging that the Supreme Court had found the Commission's prior impairment analysis "insufficiently rigorous," the Commission concluded there that an impairment finding as to the use of a facility for local exchange service should not control the separate issue of that facility's use to provide special access. *Supplemental Order Clarification*, 15 FCC Rcd at 9594, ¶ 12. The Commission reasoned that, unless it found these distinct markets to be economically and technologically interrelated -- a finding that the Commission has not made and could not make -- "it is unlikely that Congress intended to compel us, once we determine that a network element meets the 'impair' standard for the local exchange market, to grant competitors access -- for that reason alone, and without further inquiry -- to that same network element solely or primarily for use in the exchange access market." *Id.* at 9595, ¶ 14. Of particular importance here, the Commission further explained that it "*must* gather evidence on the development of the marketplace for exchange access . . . before [it] can determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services." *Id.* at 9596, ¶ 16 (emphasis added). The Commission thus expressly acknowledged the need to make a distinct impairment finding as to access services before permitting unrestricted use of UNEs for that service.

In stark contrast to its vacatur of the *UNE Remand Order* -- where the Commission had generally refused to make market-specific conclusions -- the D.C. Circuit affirmed the *Supplemental Order Clarification* because the Commission had distinguished between the local

exchange market and the special access market. Indeed, although the issue before the court of appeals involved whether it was *permissible* for the Commission to make service-specific distinctions, in accord with the holding in *USTA,* the court went out of its way to make plain its skepticism that UNEs could be used for special access without an impairment finding as to that separate market: "[I]t is far from obvious to us that the Commission has the *power*, without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *CompTel,* 309 F.3d at 14 (emphasis added); *see id.* (stating that the Commission was "clearly correct" that *Iowa Utilities Board* required it to reconsider its prior "all-encompassing," non-service-specific interpretation of section 251(d)(2)). In this regard, the Court dismissed out of hand CompTel's argument that, under the statute, "once the Commission found a single purpose as to which an 'element' met the impairment standard, no matter how limited, [the Commission] would be forced to mandate provision of the element for all, no matter how little impairment was involved in the remainder of the telecommunications field." *Id.* at 13. In sum, the D.C. Circuit once again left little doubt about its belief that, by their nature, impairment findings must be made on a market-specific basis to be lawful.

2. Given the Competitive Nature of the Special Access Voice and Data Market, Permitting UNEs To Be Used in That Market Without Real and Significant Limitations Would Be Particularly Irrational and Contrary to the Goals of the Act

As a matter of both law and sound policy, it is particularly important that the Commission make service-specific judgments about UNE access in the context of special access services. Because overbroad unbundling can undermine facilities-based competition and thus be contrary to the "goals of the Act," *Iowa Utils. Bd.*, 525 U.S. at 388, it is wholly inappropriate to mandate unbundling where a market *already* has significant facilities-based competition. *See USTA,* 290 F.3d at 429 (determining that the Commission had acted unlawfully in mandating unbundling in market that was already characterized by "'intense facilities-based competition'") (quoting Petitioners' Br. at 3). As the D.C. Circuit declared, such a "naked disregard of the competitive context" is not permitted under the statute. *Id.*

That analysis is directly applicable here. This Commission has long distinguished the special access market from the market for local exchange service, and concluded that special access facilities were suitable for competitive supply. As long ago as 1992, the Commission acknowledged the extensive build-out of alternative fiber networks and concluded that DS1 and DS3 special access service were subject to competitive supply. *Special Access Order,*[1] 7 FCC Rcd at 7454-55 n.412. The Commission further noted that this competitive pressure was growing rapidly and would continue to do so. *Id.* at 7453, ¶ 177 (recognizing that in 1992 "competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection").

As a result of the Commission's decisions, a competitive market for special access continues to flourish today. As the Commission has properly recognized, competition in the

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[1] *See* Report and Order and Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, 7 FCC Rcd 7369 (1992) ("*Special Access Order*").

special access market is now "mature." *Supplemental Order Clarification*, 15 FCC Rcd at 9597, ¶ 18. Indeed, it was the existence of extensive facilities-based competition that the Commission relied upon in large part to justify the *Supplemental Order Clarification*. The Commission was clear that it wanted to limit the use of UNEs to provide special access to avoid "undercut[ting] the market position of *many facilities-based competitive access providers*." *Id.* (emphasis added).

The record in this proceeding demonstrates that extensive facilities-based competition continues to exist in this market. The facts establishing the highly competitive nature of special access markets have been discussed in detail in prior filings (including the *UNE Fact Report 2002*[2] and Verizon's December 17, 2002 ex parte), but a few key points demonstrating the lack of impairment in these markets are worth noting.

First, competitive access providers serve over 140 million voice-grade equivalent special access and private lines.[3] That is approximately *double* the number of special access lines served by the BOCs (BOCs serve about 80 million voice-grade equivalent special access lines, including those resold to competing carriers).[4] Indeed, competitors serve approximately 95 million voice-grade equivalent special access lines -- more than the total number of voice-grade equivalent BOC lines -- *entirely over their own facilities or those of competitive suppliers*.[5]

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[2] *UNE Fact Report 2002*, attached to Comments and Contingent Petition for Forbearance of the Verizon Tel. Companies, CC Docket Nos. 01-338 (FCC filed Apr. 5, 2002).

[3] As of June 2002, CLECs served approximately 17-24 million switched access lines using their own local switches, plus approximately 10 million lines through resale or UNE-P – for a total of roughly 30 million switched access lines. *See UNE Rebuttal Report* at 2; *UNE Fact Report 2002* at I-5. Subtracting that 30 million from the 170 million voice-grade equivalent lines that CLECs report yields 140 million special access lines.

[4] FCC, *Statistics of Communications Common Carriers 2001/2002 ed.*, at Table 2.6 (Sept. 2002). Although the BOCs report serving fewer voice-grade equivalent special access line than what the CLECs report, this is likely due to the fact that CLECs have captured many individual customers with very intense demand for high-capacity lines. This reflects the fact that the demand for special access is highly concentrated. Significantly, CLECs have acknowledged that they typically serve their largest customers entirely with their own facilities. *See, e.g.*, Declaration of Anthony Fea and Anthony Giovanucci ¶ 58, attached to AT&T Reply Comments, CC Docket Nos. 01-338 (FCC filed July 17, 2002) (acknowledging that AT&T often "self-provides DS-3 transport.").

[5] Assuming that the BOCs provided approximately 44 percent (35 million) of their voice-grade equivalent special access lines directly to end users – which is the same percentage of special access revenues they generate from end-users – means that they are providing the other 45 million voice-grade equivalent special access lines to competing carriers. Subtracting that figure from the 140 million voice-grade equivalent special access lines that competitors are providing yields 95 million.

Moreover, the leading independent study of the CLEC industry – New Paradigm Resources Group's *CLEC Report 2002* – reports that CLECs earned approximately *$10 billion* in special access and private line revenues in 2001.[6] By comparison, according to the FCC's most recent *Telecommunications Industry Revenues* report, the Bell companies earned approximately $13 billion in the provision of special access revenues in 2000 – the most recent year for which such data are available.[7] Based on these figures, and factoring in a year's worth of growth, competing carriers have now captured *more than one-third of all revenues* for special access services -- and they have done so under the *Supplemental Order Clarification* regime that has largely prevented the use of UNEs to bypass BOC special access.

This extensive level of competition includes special access provided at the DS-1 level. In at least 45 of the top 50 MSAs, there are at least two – and in most cases three or more – companies providing DS-1 service on a wholesale basis. One company alone, Allegiance Telecom, offers DS-1 service in 34 of the top 50 MSAs.[8] Numerous other companies, including Cable & Wireless, AT&T, PaeTec, WorldCom, WilTel and Electric Lightwave, offer wholesale and/or retail DS-1 special access in markets throughout the country.

Given the fact that competitors already have captured such a large share of the special access market -- and have done so with strictly limited access to UNEs to provide special access -- there can be no serious dispute that special access services are not "unsuitable for competitive supply" so as to justify unbundling. *USTA*, 290 F.3d at 427. Simply put, the best evidence that CLECs *can* provide this service over their own facilities or those leased from others is surely the fact that they *are* doing so in geographic markets throughout the country.

Indeed, the Commission's *Pricing Flexibility Order*[9] -- which like the Supplemental Order Clarification was affirmed by the D.C. Circuit, *see WorldCom, Inc. v. FCC*, 238 F.3d 449

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[6] *See* New Paradigm Resources Group, Inc. , *CLEC Report 2002*, Ch. 3 at Table 13 (16th ed. 2002); ALTS, *The State of Local Competition 2002*, at 18 (Apr. 2002). In analyzing special access competition, New Paradigm's *CLEC Report 2002* takes the same approach as the FCC's own local competition surveys, and treats special access and local private line service as a single category. *See* Ind. Anal. Div., FCC, *Local Competition: August 1999* at Table 2.4 (Aug. 1999) (computing CAP/CLEC market share of "Local private line and special access service").

[7] J. Lande & K. Lynch, Ind. Anal. Div., FCC, *FCC Telecommunications Industry Revenues 2000* at 13 (Table 5, Lines 305 & 312) and 17 (Table 6, Lines 406 & 415) (Jan. 2002). Special access revenues are the sum of two revenue categories: "local private line and special access" and "long distance private line service." The FCC defines "long distance private line services" to "include revenues from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. *This category should include revenues from the resale of special access services.*" FCC, *Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms* at 20 (Feb. 2001) (emphasis added). AT&T has acknowledged that special access revenues represent the sum of these two categories. *See* Declaration of Michael Pfau, attached to AT&T Reply Comments, CC Docket No. 96-98 (FCC filed Apr. 30, 2001).

[8] Allegiance Telecom, *Wholesale Telecom Solutions, Dedicated DS1 Aggregation,* http://www.algx.com/wholesale/dds1.jsp.

[9] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd 14221 (1999).

(D.C. Cir. 2001) -- was expressly based on the fact that there is special access competition in many MSAs throughout the country, and thus that the market, not regulators, should set prices. *See Pricing Flexibility Order*, 14 FCC Rcd at 14233, ¶ 21 ("We now conclude that market forces, as opposed to regulation, are more likely to compel LECs to establish efficient prices."). At the very least, therefore, in markets where BOCs have met the Commission's competitive triggers, and in markets with similar characteristics, competitors can compete without UNEs and unbundling is wholly inappropriate and unlawful.

For the Commission to disregard the facts in this record, and its own prior conclusions that competition exists for special access, and mandate unbundling of high-capacity facilities for special access -- even in markets where the Commission has granted pricing flexibility -- would be to engage in the same "disregard of the competitive context" that the D.C. Circuit found unlawful in *USTA*. Just as in that case, the Commission would be ignoring extensive evidence that the market is *already* characterized by extensive facilities-based competition and "inflict[ing] on the economy" the significant costs associated with unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition." *USTA*, 290 F.3d at 429. As in *USTA*, that result would be deeply contrary to the goals of the Act and thus unlawful. Accordingly, the Commission should adhere to its precedent in the *Supplemental Order Clarification,* and ensure that it does not permit access to UNEs for special access, at least without significant restrictions of the type contained in that prior Commission order.

* * *

The Commission should avoid these results by maintaining the restrictions contained in the *Supplemental Order Clarification* or adopting other meaningful limits on the use of high-capacity facilities to provide special access.

Modified Safe Harbors
(Without a Usage Measure)

ILECs are not required to provide or convert to a UNE any circuit that does not meet the local exchange service requirement. Local exchange service criteria shall apply at the level of the individual local channel and transport circuit:

- Each local circuit must have a local number assignment tied to the Public Switched Telephone Network and porting capability.

- Each local circuit must have 911 capabilities such that calls to 911 PSAPs will show the assigned number or hunt group containing the assigned number.

- Each local circuit must originate and terminate local voice traffic. The originating and terminating local voice traffic should include the ability to make originating local voice telephone calls without a toll charge and without dialing special digits not normally required for a local call.

- The local exchange line should be connected to a Class 5 switch (a local switch) or equivalent registered in the LERG as a Class 5 switch capable of local exchange service.

- The service must be marketed, advertised and sold as a local exchange service, or a bundle of services including local.

The revised safe harbors should include:

- ILECs are not required to provide or convert to a UNE any DS-1 channelized high capacity loop unless at least 50% of the activated channels on the loop meet the local exchange service requirement.

- ILECs are not required to provide or convert to a UNE any DS-3 channelized high capacity loop unless 100% of the activated DS-1s meet the local exchange service requirement.

- UNE loops must be terminated into a collocation arrangement or connected to a UNE transport facility.

- ILECs are not required to provide or convert any DS-1 or DS-3 interoffice facility to a UNE unless all the loops subtending the interoffice facility meet the local exchange service requirement.

- UNE interoffice transport facilities must have both ends terminating into a collocation arrangement or be part of a valid UNE combination.

Integrated Packet Services (excluding switching):

For next generation integrated packet services to be eligible for provisioning over UNEs, the CLEC must demonstrate that at least 50% of the circuit's bandwidth is used and continuously available for dialing and conducting simultaneous local voice calls. To be eligible, there must be a sufficient number of working local telephone numbers assigned to the circuit to allow 50% of the bandwidth to be used for simultaneous local voice calls, with porting capability as described above, 911 capacity as described above, originating and terminating local voice traffic as described above, and the circuit must connect to a Class 5 switch or equivalent as described above. Only non-channelized DS-1 circuits ordered after the effective date of the Triennial Review Order could be or will be eligible for provisioning over UNEs under this provision.

As with other UNEs, UNE loops used in this fashion must terminate into a collocation arrangement or be connected to a UNE transport facility. UNE interoffice transport facilities being utilized in a packet network must have both ends terminating into a collocation arrangement or be part of a valid UNE combination.

Audit Rights:

If the CLECs are allowed to attest to compliance to receive UNEs and EELs, then ILECs should be allowed to audit. Under no circumstances should the ILEC be required to prove the CLEC has misclassifications before it is allowed to conduct the audit to gather the data needed to determine if there are misclassifications or otherwise be impeded in exercising its audit rights. The ILEC should bear the cost of the audit unless the audit reveals noncompliance, in which case the CLEC should reimburse the ILEC for the cost of the audit.

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January 30, 2003

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

This letter explains why the Commission should not modify its rules limiting the ability of carriers to substitute unbundled loop-transport combinations (so-called "EELs") for special access services.

Executive Summary:

- *First*, the requirement to provide "enhanced extended loops" or "EELs" was originally established as a way to extend the reach of CLECs' local switches in order to provide competing local telephone service. By contrast, as the Commission and the D.C. Circuit have expressly held, special access services for the origination and termination of non-local traffic comprise a distinct and separate market and the Act therefore requires the Commission to undertake a separate, service-specific impairment analysis for special access services. Moreover, as the Commission previously found, special access is a "mature source of competition in telecommunications markets," and competing carriers have not (and cannot) show that they are impaired without access to unbundled elements to provide special access. In the absence of such a showing, the Commission recognized that substituting EELs for special access would be inconsistent with the Act, "undercut the market position of many facilities-based competitive access providers," and threaten revenues that ILECs depend on to support the local network. The D.C. Circuit expressly upheld the Commission's analysis, and pointedly suggested that such a service-specific analysis is required by the express terms of the Act. According to the Court, "it is far from obvious . . . that the FCC *has the power* without an impairment finding as to *nonlocal services* to require that ILECs provide EELs for such services."

- *Second*, based on this analysis, the Commission determined that EELs should be available only to carriers providing "a significant amount of local exchange service" over that facility. It also adopted three alternative tests for satisfying this standard that had been proposed by a cross-industry group of CLECs and ILECs. The dual lynchpins common to these tests were specific, objective criteria for what constituted a significant amount of

local exchange traffic, and a prohibition on the "commingling" of unbundled elements (such as loops) with special access services (such as special access transport). These specific tests also were expressly upheld by the D.C. Circuit, which rejected claims the rules were not administratively feasible, relying on evidence provided by the FCC that carriers were taking advantage of the availability of EELs. Indeed, in Verizon's case alone, CLECs have obtained more than 400,000 voice-grade equivalent circuits as EELs, including more than 200,000 in the last year. The Court also expressly affirmed the commingling restriction as "the only way to prevent carriers from using [EELs] 'solely or primarily to bypass special access services,'" because the absence of such a restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops."

- *Third*, in the wake of the D.C. Circuit decision, other parties appear to concede that restrictions on the availability of EELs are required, but have filed a series of recent *ex partes* proposing wholesale changes to the current rules that would make them meaningless. These proposals are based on a false premise: it is simply not true that existing restrictions have prevented CLECs from obtaining access to EELs. As noted, CLECs *have* obtained hundreds of thousands of voice-grade equivalents from Verizon alone. More important, because the "restrictions" that the CLECs have proposed provide no meaningful limit at all, their effect would be to prescribe special access rates at TELRIC, and undercut what the Commission already found to be a mature source of competition. Moreover, the ultimate impact of these proposals would be to create a new high-capacity, business UNE-platform for dedicated services (regardless of service type), with even more deleterious consequences than the current UNE-platform requirement for mass market services. Indeed, the proposals would cost Verizon alone in excess of *$1 billion* in special access revenues annually, with catastrophic consequences for local network investment and for the continued viability of facilities-based competition.

- *Fourth*, to the extent the Commission has any remaining concerns about the ability to use EELs to extend the reach of CLEC switches for local voice service in the absence of an unbundled switching requirement, those concerns can be addressed directly. As we have explained elsewhere and address below, the Commission could adopt a narrow exception to the commingling prohibition to permit CLECs to connect analog voice grade loops used to provide competing local telephone service to special access transport. Likewise, to the extent the Commission has a concern about potential abuse of the auditing rights provided by its rules, which Verizon has never invoked, it can address any such concerns directly. What the Commission should *not* do is modify the existing EELs restrictions more broadly, without first subjecting the details of any proposed changes to public comment and thoroughly exploring the ramifications of any modification. Even small changes to the existing rules likely will have large and unintended consequences. But it is impossible for parties to comment intelligently (and, therefore, for the Commission to make an informed decision), without first knowing what, if any changes, are under consideration and without knowing what elements have to be made available in the first place.

Discussion:

1. Background: EELs Are Intended To Extend the Reach of CLEC Local Switches, Not To Facilitate Special Access Bypass

EELs are combinations of unbundled local loops and unbundled dedicated transport that provide a link between a requesting carrier's collocated facilities in one wire center and a customer served out of a distant wire center. The EEL requirement reflected regulators' interest in providing a way for competitors to extend the reach of their switches for the provision of local exchange service without the need to establish additional collocation arrangements. As the NYPSC put it, by permitting CLECs access to EELs, "CLECs with at least some network facilities [are able] to gain access to unbundled local loops in many central offices without the need to collocate in each . . . central office, thereby enhancing CLECs' ability to vie for local customers."[1] The explicit justification for requiring access to EELs was that it would spur the "development of facilities-based *local* competition . . . principally geared toward . . . residential and smaller business markets."[2]

In the *UNE Remand Order* proceeding, the Commission likewise noted that the purpose of EELs was to "extend[] a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated" thus permitting the carrier to "transport[] aggregated loops over efficient-high capacity facilities *to their central switching location.*" *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 288 (1999) (emphasis added). The Commission limited access to these loop-transport combinations to *only* those circumstances where such arrangements would be used to provide a "significant amount of local exchange service in addition to exchange access service, to a particular customer."[3]

At the same time, the Commission refused to require ILECs to make EELs available solely or primarily for use in the provision of special access service.[4] That determination was firmly grounded in the recognition that the special access market is separate and distinct from the local exchange market. Indeed, the "exchange access market occupies a different legal category from the market for telephone exchange service." *Supplemental Order Clarification* ¶ 14. And, as the Commission has found, the market for special access has become highly

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[1] Order Directing Tariff Revisions, *Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements*, Case 98-C-0690, at 2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1999).

[2] *Id.* at 7-8 (emphasis added); *see also* 8, n.5 ("EEL arrangements potentially offer CLECs an important additional means of executing a plan to enter the *local exchange* market.") (emphasis added).

[3] *Supplemental Order*, 15 FCC Rcd 1760, ¶ 5 (1999).

[4] *Id.* at ¶ 4; *see also Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 8 (2000).

competitive in the absence of access to UNEs. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Id.* ¶ 18. Special access customers are characteristically large businesses with high traffic volumes – voice, data, or both – justifying dedicated point-to-point facilities to carry traffic to IXCs' or ISPs' points of presence. Competitors have captured at least 36 percent of that market. In light of that record, the FCC concluded that there was no evidence that competitors are impaired in their ability to provide special access without access to unbundled loops and transport. *Id.* ¶ 15. Far from promoting competition, permitting requesting carriers to substitute UNEs for special access would "undercut the market position of many facilities-based competitive access providers." *Id.* ¶ 18. Moreover, such special-access bypass would cause "substantial market dislocations," threatening to eliminate ILEC special access services, thereby jeopardizing an important source of revenues that help to support the local network. *Id.* ¶ 7.

The crucial legal determination in the *Supplemental Order Clarification* is that section 251(d)(2) should be read to require a *service specific* analysis to determine whether a requesting carrier would be impaired in its ability "'to provide *the services that it seeks to offer.*'" *Id.* ¶ 15 (quoting 47 U.S.C. § 251(d)(2)(B)).[5] The Commission found that the parties had presented no evidence that carriers would be impaired in the provision of special access service in the absence of access to EELs. *See id.* ¶ 16. The Commission rightly determined that it could not "impose [unbundling] obligations first and conduct our 'impair' inquiry afterwards." *Id.* Rather, the burden is on requesting carriers affirmatively to demonstrate impairment *in the provision of special access service* to justify unbundling of UNEs for the provision of such service – something that they have not and cannot do.

The D.C. Circuit expressly upheld this analysis in its *CompTel* decision. The Court first upheld the Commission's determination to conduct a service-specific impairment analysis. The Court agreed that, in conducting its impairment analysis, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel v. FCC*, 309 F.3d 8, 13 (2002). Indeed, the Court indicated that such a service-specific inquiry is not merely permitted, but *required* in this case: "it is far from obvious . . . that the FCC *has the power* without an impairment finding as to non-local services, to require that ILECs provide EELSs for such services." *Id.* The Court agreed that there was no evidence to suggest that requesting carriers are impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements. *Id.* And the Court likewise found that the Commission's concerns about market

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[5] *See also UNE Remand Order* ¶ 81 (holding that, because "[d]ifferent types of customers use different *services* . . . it is appropriate for us to consider the particular types of customers that the carrier seeks to serve")(emphasis added); *Line Sharing Order*, 14 FCC Rcd 20912 ¶ 31 (1999) (reiterating conclusion that "it is appropriate to consider the *specific services* and *customer classes* a requesting carrier seeks to serve when considering whether to unbundled a network element")(emphasis added).

dislocations and undermining the market position of facilities-based competitors provided further justification for its restrictions. *Id.* at 16.

2. *The Existing Restrictions Should Not Be Changed*

In an effort to give content to its determination that unbundled loop-transport combinations should be made available only for use to provide a "significant amount of local exchange service," the Commission set out three sets of circumstances under which a carrier would satisfy that requirement. *Supplemental Order Clarification* ¶ 22.

These existing "safe harbors" were the result of negotiations by a broad cross-section of the telecommunications industry, including both ILECs and CLECs. The criteria include requirements designed to ensure that the EELs are being used to connect to the CLEC's local switch rather than an IXC or ISP POP – the purpose of the collocation requirement – as well as traffic volume requirements designed to ensure that the EELs are being used predominantly for local traffic, not just long-distance traffic. *Id.* ¶ 22. In addition, the Commission adopted a prohibition on "commingling," a term it used to refer to the combining of unbundled elements (such as loops) with special access services (such as special access transport circuits). *Id.* ¶ 28. The purpose for this provision was to ensure that each of a carrier's customers satisfies the substantial local usage requirement and to prevent all special access channel terminations from being immediately converted to unbundled loops at TELRIC rates. *Id.*

Moreover, the D.C. Circuit specifically upheld the Commission's safe harbors, rejecting claims that the restrictions were not administrable. The court held that "it is plain that supplying the information is feasible, as the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *CompTel*, 309 F.3d at 17. The Court likewise agreed with the FCC that the commingling restriction is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" and that the absence of such a restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id.*

Despite the Commission's earlier decision – and the D.C. Circuit's approval of that decision – CLECs again argue that the current restrictions must be changed because they are overly restrictive and have prevented them from obtaining EELs. But experience proves that carriers can and do take advantage of the current safe harbors to gain access to EELs. Verizon alone has provisioned more than 400,000 voice-grade equivalent circuits as unbundled loop transport combinations – more than 200,000 in the last year alone. More than a dozen CLECs, large and small, have converted special access circuits to EELs.

Indeed, if anything, the current safe harbors are not restrictive enough and allow circuits to be "flipped" to sub-competitive TELRIC pricing even when they are used predominantly for exchange access service, rather than local exchange service. Some requesting carriers have gamed the existing rules by self-certifying compliance with the Commission's safe harbors, even in circumstances where the circuits at issue on their face did not satisfy the clear requirements of the Commission's rules. *See, e.g., Net2000*

Communications, Inc. v. Verizon Washington, D.C. Inc., 17 FCC Rcd 1150 (2002). In the *Net2000* case, the requesting carrier sought conversion of existing special access circuits, and "certified that the circuits provided 'a significant amount of local exchange service to the particular customers served.'" *Id.* at ¶ 11. Verizon did not convert the circuits because the request on its face did not "conform to the Commission's requirements." *Id.* After the requesting carrier brought a formal complaint, the Commission vindicated Verizon and held that the requesting carrier's certification was improper. As the Commission held, "the requested circuits were . . . ineligible for conversion" and thus the carrier's request for conversion "in conflict with [the Commission's] co-mingling restriction was inappropriate." *Id.* ¶ 33.

Notably, *Verizon's* record of compliance with the Commission's rules on this score is unblemished, and whenever Verizon's practices in this regard have been challenged – formally or informally – Verizon has prevailed. Moreover, while some parties have complained that incumbents might abuse the existing rules that permit audits to verify compliance with the Commission's rules, Verizon has never invoked that right. Thus, while the audit right is important to protect against abuse by requesting carriers, any suggestions that *Verizon* has abused that right are simply fabrications.

Carriers also have objected to the existing safe harbors because they prevent requesting carriers from using unbundled loop-transport combinations to establish dedicated connections to IXC or ISP POPs. But that provides no basis for criticizing the existing rules; to the contrary, the very purpose behind the restrictions is to ensure that EELs are not used simply as a TELRIC-priced substitute for special access.

In short, actual experience under the existing rules has provided firm empirical evidence that the rules do not prevent carriers from obtaining EELs. To the contrary, that experience demonstrates that, if anything, the restrictions are too lax; carriers have gamed the existing rules to obtain access to EELs without providing local services or connections to the switched local network. Too often, EELs have simply been used simply as a new high-capacity, dedicated UNE-platform for large businesses. And such use of EELs is inconsistent with the purpose for which those facilities are intended and undermines, rather than promotes, facilities-based local competition.

3. Proposals to Change the Existing Rules Would Impose No Meaningful Limits At All, And Would Destroy a Working Competitive Market

As outlined above, EELs were originally conceived as a way for new entrants to extend the reach of their local switches in order to promote competing local voice services, particularly in the residential and small business markets. As a purely legal matter, a finding that EELs should be made available for *those services* does *not* permit EELs to be made available to carriers seeking to establish dedicated connections for non-local traffic being carried to IXC POPs, or delivered to ISPs. *Supplemental Order Clarification* ¶ 16. Rather, the Commission must carry out a service-specific impairment analysis *before* EELs can be made more widely available.

Because they cannot demonstrate that they would be impaired in the provision of special access services without access to EELs, CLECs now try to avoid that fundamental principle by instead proposing changes to the existing rules that would ostensibly be easier to administer. But those proposals work far more than mere "administrative" changes. They fail to impose *any* meaningful limitations on access to EELs; if adopted, those proposals would effectively prescribe TELRIC rates for special access services and would violate the Act.

Some parties have claimed that the only limitation that is needed is a requirement that an EEL terminate in a requesting carrier's collocation arrangement. To be sure, because EELs were intended to extend the reach of a CLEC's local switch, the Commission should require, as it currently does, that an EEL terminate in a collocation arrangement *and* that CLECs certify that the traffic received over the EEL is predominantly local traffic routed to the CLEC's local switch. But the requirement that an EEL terminate in a collocation arrangement, standing alone, does not impose a significant limitation – large carriers already have nearly ubiquitous collocation arrangements, already terminate a significant portion of their special access circuits to collocation arrangements, and could readily reconfigure the rest to do so. The result would be TELRIC priced special access.

Likewise, a requirement that a requesting carrier assign a local number to a circuit, or provide a porting capability or a local voice capability would pose no meaningful limitation on special access bypass. At most, any such requirements may mean that some part of a circuit might be capable of providing local service. They do not require a substantial amount of local traffic, which is an absolute prerequisite to EEL use under the impairment analysis. And requiring the assignment of a local number is meaningless. First, CLEC misuse of local number resources is well established, and would provide no check on gaming. Second, such a rule is simply inadequate. For example, assigning a single telephone number to a DS-3 or DS-1 would appear to be sufficient to convert it to TELRIC pricing under the CLECs' proposals.

CLECs' remaining criteria are window dressing, not meaningful limitations related to the use of a particular facility. Essentially all carriers that purchase special access, including AT&T, WorldCom and others, already have state certificates of authority, PSAP 911 certificates, interconnection agreements, and local interconnection trunks. None of these indicia that a carrier might carry local traffic somewhere in a jurisdiction answer the question required under the impairment analysis: does the EEL in question carry a substantial amount of local traffic. These requirements would create no meaningful obstacle to special access bypass.

The Commission should also reject proposals for abandoning the prohibition on commingling, *i.e.*, combining unbundled elements with special access. Absent this restriction, as the Commission and D.C. Circuit have expressly found, carriers would be able to convert the entire base of special access channel terminations into unbundled local loops to be provided at UNE rates. *See CompTel*, 309 F.3d at 17-18. As the Commission previously recognized, the consequences would be disastrous both for ILECs and for the future of facilities-based competition in this mature segment of the market.

Adopting the recent CLEC proposals would thus ignore the clear guidance of the D.C. Circuit, which has firmly endorsed both the Commission's existing restrictions and the policy considerations that underlie those rules. Moreover, such a policy would create a new UNE-platform for high-capacity dedicated services and "induc[e] IXCs to abandon [special and] switched access for unbundled network element-based special access on an enormous scale." *Supplemental Order Clarification* ¶ 7. The ramifications of such a policy for investment incentives and the health of the industry would be even more severe than with the current mass market UNE-platform requirement, because there is already a mature, competitive market in special access. Moreover, permitting special access bypass would eliminate a critical source of revenues that help pay for the cost of operating, maintaining, and upgrading local telephone networks to provide broadband and other new service capabilities. Allowing access to existing special access facilities at UNE prices thus serves no competitive purpose under the Act, and in fact injures facilities-based competition by undercutting existing facilities-based providers. Indeed, imposing an unbundling obligation for special access services would create a vicious cycle by undercutting existing facilities-based providers, deterring carriers from deploying new facilities, and, by doing so, indefinitely perpetuate both unbundling and regulation.

If the new CLEC proposals prove anything, it is that the Commission should not make any significant modifications to the existing EELs restrictions until the parties have had a chance to debate these and other proposals fully. Unlike the Commission's unbundling rules – which the Commission is required to revisit in light of the D.C. Circuit's decision in *USTA* – the Commission's existing restrictions on special access bypass have been *upheld* by the D.C. Circuit in *CompTel*. The Commission is under *no* obligation to modify those rules, which are indisputably consistent with the 1996 Act. Accordingly, the Commission should not rush to modify existing rules at the risk of opening the door to special access bypass on a massive scale. The ramifications of such a development – for incumbents, for facilities-based competitive access providers, and for local network investment – would be devastating.

Moreover, as noted above, to the extent the Commission has any remaining concerns about the ability to use EELs for their intended purpose, they can be addressed directly. In particular, the Commission could adopt a narrow exception to the commingling prohibition in its current rules to permit CLECs to connect single channel analog voice grade loops to special access transport. This would provide CLECs with another alternative (in addition to those already available) to extend the reach of their switches to customers in distant wire centers by obviating the need for collocation in the wire center serving the unbundled voice grade loops. If the Commission does so, however, it is critical to prevent gaming by making clear that the substantial local use standard applies to any such standalone loops, and by requiring a certification that the loop terminates on a CLEC switch which is used for originating and terminating local voice calls. Moreover, the Commission should make clear that the special access transport circuit is not subject to TELRIC pricing under these circumstances – which is sometimes referred to as "ratcheting." On the contrary, even the CLECs have conceded that ratcheting is unnecessary. *See* Transcript of Oral Argument, *CompTel v. FCC*, Case No. 00-1272 at 20 (D.C. Cir. Sept. 5, 2002) (Counsel for Intervenors WorldCom et al. ("Now we're not trying to convert the transport link. We'll pay full access

rates for that, so there's no chance that we can cheat. We're talking about only wanting to convert local loops").

Likewise, to the extent the Commission has any concerns about possible abuse of the audit rights in its existing rules, it can address any such concerns directly as well. As noted above, Verizon has never even invoked its audit rights, and any such concerns are unfounded in our case. To the extent there are concerns about specific practices of other parties, however, any such concerns can be addressed without a wholesale abrogation of the existing rules.

What the Commission should *not* do (and cannot do consistent with the Act's impairment standard), however, is modify the existing restrictions more broadly without first airing the details of any proposed changes so that parties can comment fully on the ramifications for the competitive special access market. This is an area where even small changes will likely have large, unanticipated, and unintended consequences. And the cost of getting it wrong is enormous, both in terms of the consequences for local network investment and for the continued viability of facilities based competition in a mature segment of the market.

Sincerely,

William P. Barr

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein
W. Maher
C. Libertelli
M. Brill
J. Goldstein
D. Gonzalez
L. Zaina